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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MONIQUE SYKES, et al.,

4 Plaintiffs,

5 v.

09 Civ. 8486

6 MEL S. HARRIS and ASSOCIATES
7 LLC, et al.,

8 Defendants.

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9
10 October 11, 2011
10:30 a.m.

11 Before:

12 HON. DENNY CHIN,

13 District Judge

14 APPEARANCES

15 CLAUDIA E. WILNER, ESQ.
16 JOSHUA ZINNER, ESQ.

17 NEIGHBORHOOD ECONOMIC DEVELOPMENT
ADVOCACY PROJECT
Attorneys for Plaintiffs

18 EMERY, CELLI, BRINCKERHOFF & ABADY, LLP
Attorneys for Plaintiffs

19 BY: MATTHEW D. BRINCKERHOFF
EISHA JAIN

20
21 CAROLYN E. COFFEY, ESQ
ANAMARIA SEGURA, ESQ.
22 MFY LEGAL SERVICES, INC.
Attorneys for Plaintiffs

23 KAUFMAN, DOLOWICH, VOLUCK & GONZO
Attorneys for Defendants
24 BY: BRETT A. SCHER

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1 McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Defendants
2 BY: LEWIS H. GOLDFARB
JORDAN SKLAR
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11 (Case called)

12 MR. BRINCKERHOFF: Matthew Brinckerhoff for the
13 plaintiffs.

14 MS. WILNER: Claudia Wilner for the plaintiffs.

15 MS. COFFEY: Carolyn Coffey for the plaintiffs.

16 MS. SEGURA: Anamaria Segura for the plaintiffs.

17 MS. JAIN: Eisha Jain for the plaintiffs.

18 MR. ZINNER: Josh Zinner for the plaintiffs.

19 THE COURT: A lot of lawyers for the plaintiffs.

20 MR. GOLDFARB: Lewis Goldfarb for the Leucadia
21 defendants.

22 MR. SKLAR: Jordan Sklar for Leucadia.

23 MR. SCHER: Brett Scher on behalf of the Mel Harris
24 defendants.

25 MS. VOLIK: Heather Volik for non-party MFY, Ms.

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1 Segura and Ms. Coffey.

2 THE COURT: Good morning.

3 We have a number of items. We have the subpoenas. I
4 don't know if there are other discovery disputes, I don't
5 recall. I know there is a question about extending the cutoff
6 and then we have the class certification motions.

7 Was there anything else?

8 MS. COFFEY: The subpoena question is both the
9 non-party subpoena and a motion to quash pending as well.

10 THE COURT: Would they be related?

11 MS. COFFEY: They are not related.

12 THE COURT: They are not related. Okay.

13 Are they the same subpoenas?

14 MS. COFFEY: No.

15 THE COURT: Okay. Why don't we do the non-party
16 subpoenas first.

17 What is the dispute?

18 MR. SCHER: Your Honor, Brett Scher on behalf of Mel
19 Harris.

20 There are actually two non-party subpoenas that are
21 the subject here. The first one is with respect to subpoenas
22 that the defendants served on MFY and two individuals that are
23 listed as being responsible for preparing a report that MFY
24 released to the public called Justice Is Served. MFY has
25 objected to that subpoena and has refused to appear, and the

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1 two individuals for those depositions.

2 The reason those depositions were sought and the
3 information that was requested therein is that Justice Is
4 Served report was quoted in the third amended complaint as
5 evidence of my client's and the other defendants' participation
6 in the sewer service scheme that they have alleged. In the
7 report itself is refers to questionable patterns of process
8 serving they discovered. They found that New Yorkers generally
9 had taken legal notice as seriously and always responded and
10 went to court; that the defendants in these debt collection
11 cases did not appear on behalf of these cases because they were
12 not served and not because of my other reason. So to the
13 extent it has been quoted in the third amended complaint and
14 then as actually used and --

15 THE COURT: Wouldn't you object at trial to the
16 introduction of that on hearsay grounds among other things?

17 MR. SCHER: Yes, your Honor. The problem is it has
18 already been used to defeat the motion to dismiss and used in
19 the class certification notice. There was no reason to put it
20 in there. They kept it in there through three amendments of
21 the client and we are entitled as part of the fact finding
22 discovery to find out what was the basis, what was the
23 methodology used and where they came up with these conclusions,
24 and specifically to the extent that it attacks my clients and
25 the manner in which they handled their legal cases I think I am

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1 entitled to ask those questions.

2 THE COURT: Let me hear from the recipients of the
3 subpoenas. There is no question about service or anything like
4 that. What is the objection?

5 MS. VOLIK: The objection is these depositions are to
6 depose the attorneys that are in this case. Normally discovery
7 is given a broad leeway. However, I think it's clear that
8 these subpoenas are simply to harass the attorneys in this
9 matter. As you said before, --

10 THE COURT: The report was drafted by the attorneys or
11 someone else, by a non-attorney?

12 MS. VOLIK: The report was drafted by MFY and the
13 attorneys were part of it. However --

14 THE COURT: Are they MFY attorneys?

15 MS. VOLIK: Yes. However, the report is not evidence
16 of the case. The report is not at issue. It's the underlying
17 actions that the report discusses. In fact, over a year ago
18 MFY was served a subpoena for documents related to the report.
19 They produced those documents and those documents relate to the
20 actions that are alleged in the report and, in fact, most of
21 the documents and most of the documentation are actually
22 documents that were prepared by defendants in their court cases
23 in the state courts.

24 THE COURT: The objection is the subpoenas are
25 harassing?

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1 MS. VOLIK: The objection is the subpoenas are looking
2 for evidence that is not related to the action or it could be
3 used as evidence. Because the subpoenas are towards attorneys
4 that are actually active in this matter it should be looked at
5 for all of the circumstances that are there.

6 THE COURT: Do the plaintiffs intend on trying to
7 offer the report itself?

8 MR. BRINCKERHOFF: That is our understanding, your
9 Honor. We have no objection to introducing or attempting to
10 introduce it. It was background information to fill out a
11 rather complex web of facts. But we don't intend to rely on
12 anything in the report, to introduce the report, to use the
13 report in any way and, of course, we are talking about
14 depositions of the attorneys who represent the plaintiffs in
15 this putative class.

16 THE COURT: Again, I missed that fact. The subpoenas
17 are served on lawyers who actually are counsel in the case?

18 MR. BRINCKERHOFF: Defendants are seeking to depose
19 plaintiffs' counsel in this case -- Ms. Segura.

20 THE COURT: Okay.

21 MR. SCHER: If I can add, on the report itself the two
22 attorneys who are listed here are listed as the people who we
23 were supposed to contact if we have any information. It wasn't
24 a selection on our part. They were listed as the two attorneys
25 that apparently were involved in the report. That is why it

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1 was sought, not to harass.

2 THE COURT: The subpoenas on MFY and MFY attorneys are
3 quashed with the understanding that the plaintiffs will not be
4 permitted to introduce the report itself. The plaintiffs will
5 not be permitted to call the lawyers as witnesses obviously.
6 To the extent there are any other documents I think they are
7 fair game if there are any others, but it sounds like the
8 underlying documents have already been produced. That is a
9 different story. But the report itself, the conclusions, the
10 language will be inadmissible at trial.

11 Next.

12 MR. SCHER: Your Honor, the second set of party
13 depositions relates to the 5 plaintiffs who accepted offers of
14 judgment and the reason we have sought those individuals, that
15 offer of judgment was based upon a nonadmission of liability.
16 The issue that we have is that after those plaintiffs accepted
17 the offers of judgment the plaintiffs then amended their
18 complaint and continued to rely on the facts asserted by those
19 plaintiffs as evidence in this case. And that appears at
20 paragraphs 217 to 331 of the third amended client. So almost a
21 third of the allegations or a third of the paragraphs in the
22 complaint relate directly to these individuals. Plaintiffs'
23 counsel, from what I understand, agreed to accept service of
24 the subpoenas but now the dispute is that as of today we have
25 not gotten a response that these people will be produced.

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1 THE COURT: You want to depose the plaintiffs who
2 accepted offers of judgment.

3 MR. SCHER: Correct.

4 THE COURT: What is the objection?

5 MR. BRINCKERHOFF: Judge, I didn't realize we would be
6 discussing that today but I am happy to discuss any and all
7 things that come up.

8 The back and forth is that I have offered to
9 Mr. Scher, since we are going to be needing to amend the
10 complaint at some point soon anyway, that we would remove any
11 facts related to the judgment defendant or the former
12 plaintiffs who accepted offers of judgment. He explained he
13 did not find that to be acceptable. To me this is a bit of a
14 piece and similar to the other issue.

15 THE COURT: It's more than just removing them from the
16 complaint. I assume you would also not offer any of the facts
17 relating to those 5 plaintiffs, any evidence relating to those
18 5 plaintiffs.

19 MR. BRINCKERHOFF: Correct.

20 THE COURT: Are you relying on them in your class
21 certification motion?

22 MR. BRINCKERHOFF: We are not, Judge.

23 THE COURT: The only conceivable relevance I can think
24 of, in light of those representations, is an argument that
25 somehow undercuts the other plaintiffs' arguments. I am not

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1 sure what the conceivable relevance is given that they are not
2 going to rely on any of the facts relating to those 5
3 plaintiffs.

4 MR. SCHER: Your Honor, obviously the issue we have is
5 that the motion for class certification has been fully briefed
6 and submitted. To the extent that there would be any reference
7 in there and the court would be looking at the third amended
8 complaint and rendering its decision, we would be troubled by
9 the fact that we had not had the opportunity to question those
10 people. The plaintiffs had every opportunity to remove those
11 individuals and purposely changed them to representative
12 non-party facts and went ahead and proceeded to put them out
13 there.

14 THE COURT: We might be able to wait for that. But
15 let me do this: The subpoenas were already served. You
16 accepted service?

17 MR. BRINCKERHOFF: Yes.

18 THE COURT: Those subpoenas are quashed; that is, as
19 to the 5 plaintiffs who accepted offers of judgment, again on
20 the condition that none of the facts relating to those 5
21 plaintiffs whatsoever will be permitted as evidence at trial or
22 on the class certification motion. I have read the papers. I
23 don't recall whether these 5 are relied on or not but before I
24 rule I will make sure that I revisit that part. And so on
25 those bases, those subpoenas are quashed as well.

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1 What other discovery issues?

2 MS. COFFEY: There is also another non-party subpoena
3 dispute. Plaintiff served subpoenas on non-party process
4 servers to examine their log books and defendant Samserv, they
5 filed a motion to quash as improper because it's a non-party
6 subpoena and there is absolutely no right of privilege in the
7 contents of the log.

8 THE COURT: Why do you want those log books?

9 MS. COFFEY: We believe the log books will provide
10 some information that was raised in the class cert. motion
11 where we examined Samserv's data base which contains several
12 instances of questionable service by process servers.

13 THE COURT: As a comparator. In essence, you want to
14 see how other process servers do in terms of percentages of
15 successful personal service, that kind of thing?

16 MS. COFFEY: Some of the process servers who are
17 actually all in the data base that was provided, so they are
18 all process servers who used to or currently do process for
19 Samserv and --

20 THE COURT: Are we talking about individuals?

21 MS. COFFEY: Individual process servers.

22 THE COURT: Not companies.

23 MS. COFFEY: Independent contractors not employed by
24 Samserv and never were.

25 THE COURT: But who did?

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1 MS. COFFEY: Did work and some still work for Samserv.

2 THE COURT: And I gather from reading the class
3 certification papers that process servers are required by law
4 to maintain log books and we are talking about individuals as
5 well as --

6 MS. COFFEY: Just individuals, your Honor. Only
7 individuals are required to maintain log books as a
8 responsibility and they have to remain licensed in New York
9 City.

10 THE COURT: For how long?

11 MS. COFFEY: They are required to keep them for 2
12 years. We did ask for any log books they have going back to
13 December 2005, which is the length of our class definition,
14 proposed definition, but to the extent process servers don't
15 have them for that long, that is fine. Whatever they have we
16 want to look at.

17 I want to add the defendants did indicate in their
18 papers that there were several errors that may have occurred in
19 the actual data base and that the information in the data base
20 may not be accurate, but the log books are contemporaneous
21 records and we want to compare them.

22 THE COURT: What is the objection?

23 MR. SKLAR: The objection is it's tremendously
24 overbroad. There is no limitation or relationship to the
25 class. They are not looking for people who work for Mel Harris

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1 and other people who did work with the Leucadia defendants.
2 They make, it's gratifying to hear the reference to 2 years
3 now. In their papers they suggested there is a requirement to
4 maintain log books for 6 years which is simply not the case.
5 It's essentially overbroad and they are harassing of people who
6 currently or may or may not or haven't worked for Samserv for a
7 long time.

8 MS. COFFEY: If I may --

9 THE COURT: Is there a way to limit this to people who
10 work for either Mel Harris or Samserv or Leucadia?

11 MS. COFFEY: The nature of log books is you are
12 supposed to report contemporaneous records of each attempt and
13 completed service. So it would be very surprising to find that
14 someone had a log book that only related to Mel Harris cases.

15 THE COURT: In terms of the individuals you have
16 identified, how many are there?

17 MS. COFFEY: 26, your Honor.

18 THE COURT: And these are people who at one point or
19 another served process for Samserv?

20 MS. COFFEY: Correct.

21 THE COURT: And you are saying unless the log books
22 are broken down by client it's more trouble to try to redact
23 them?

24 MS. COFFEY: The log books don't record clients. They
25 only record the actual index number, the name of the case, who

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1 was served and whether it's by substitute service or not, a
2 description of the person served. So I am not even sure how
3 that would be helpful for individual process servers to go
4 through their log books and figure out which case applied to
5 Mel Harris. All we are asking for is composition books. They
6 are just books that --

7 THE COURT: Are they usually manually kept? They are
8 not computerized?

9 MS. COFFEY: They are supposed to be manually kept in
10 bound composition notebook and written in. There are all the
11 rules about how they are supposed to be kept.

12 THE COURT: In theory I think it could be relevant.
13 It could lead to relevant evidence. There ought to be a way to
14 somehow limit it so that it's reasonable.

15 MS. COFFEY: I am not sure what the reasonable problem
16 is. If it's a number of log books we would be happy to
17 discuss --

18 THE COURT: How many years did the request cover?

19 MR. SKLAR: Back to 2005.

20 THE COURT: When the class started?

21 MS. COFFEY: Right. To the extent someone has log
22 books going back that far and it was burdensome to bring them
23 to our office we could certainly work something out.

24 THE COURT: I don't see it as being a burdensome issue
25 other than you have to photocopy these things for production,

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1 but as for these individual process servers they either have
2 the books or they don't. If they have them they have to turn
3 them over. I don't see that as a burdensome issue. It would
4 be more burdensome to go through and try to figure out which
5 ones -- and that can be the plaintiffs' problem, but it seems
6 to me it doesn't make a lot of sense to try to redact them now,
7 to redact ones that aren't relevant because you would have to
8 look up every index number, figure out who the parties were and
9 then white it out. It seems to me --

10 MS. COFFEY: These entries should reflect affidavits
11 of service that are filed with the clerk so all the information
12 in there may not be publicly available in the log book but the
13 information we are talking about is not subject to privacy.

14 THE COURT: Assuming there is a protective order in
15 place with respect to these, is there a privacy issue?

16 MR. SKLAR: There may be a privacy issue. With the
17 confidentiality order we can manage but if we get limitation on
18 time, again the requirement is 2 years of maintaining these.

19 THE COURT: I think if they have them -- if it's a
20 matter of handing over a bound book it's not that big a deal.
21 If they don't have them and they are not required by law to
22 have them, then that is it. They don't have to make them up.
23 They don't have to compile them now. It seems to me I don't
24 see that as a significant issue in terms of burden. I think it
25 could be relevant, particularly if you look at log books versus

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1 the affidavits of service if there is a contradiction that is
2 something. So the objection is overruled as to these.

3 What else?

4 MS. WILNER: Your Honor, there are a number of other
5 outstanding discovery issues. Our office had sent -- we faxed
6 a letter on Friday to the court. It sounds like maybe you
7 didn't receive it.

8 THE COURT: I might have received it but I didn't read
9 it. Tell me what it is.

10 MS. WILNER: We are prepared to walk through the
11 issues if that is all.

12 THE COURT: These are all at issue?

13 MS. WILNER: Yes, they primarily relate to issues with
14 the Mel Harris defendants.

15 THE COURT: Go ahead.

16 MS. WILNER: The first one is that we have requested
17 that they provide their payments to process serving agencies,
18 both to Samserv and other agencies that were used to serve
19 process in cases involving the Leucadia defendants. And this
20 is a really important part.

21 THE COURT: You want to know the amounts?

22 MS. WILNER: Exactly. The Mel Harris defendants have
23 refused to provide this. At first they refused completely to
24 provide the information. Then they said they would provide it
25 for Samserv but they haven't actually provided it. It has been

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1 over a month since they said they would produce it and they
2 have not produced it.

3 THE COURT: You want it for everyone?

4 MS. WILNER: For everyone because we definitely need
5 it for Samserv but we also think it's important for comparative
6 purposes to compare what was paid to Samserv with what was paid
7 to other process-serving agencies doing essentially the same
8 job. The scope is limited times the period of the class and we
9 are looking only for service that was done on behalf of the
10 Leucadia defendants.

11 THE COURT: You are looking for documents or this
12 would be in the nature of an answer to an interrogatory?

13 MS. WILNER: We look for documents reflecting
14 payments.

15 THE COURT: But what you are interested in is the
16 amount per service?

17 MS. WILNER: Exactly, yes.

18 MR. SCHER: Your Honor, I think you hit it on the head
19 that the issue we have is that the demand as originally phrased
20 is you give us all billing and accounting records and they
21 narrowed it down to all payments ever paid to Mel Harris in 6
22 years to any process server we ever used. Mel Harris -- the
23 case we are talking about the plaintiffs are defining for just
24 Leucadia alone is 100,000. They want every single document
25 containing every payment with anything to do with a bill or

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1 invoice. If what they are looking for is simply an answer
2 under oath of generally how much do you pay for this type of
3 service or that type of service, it's a lot easier to do it in
4 an interrogatory than to come back and say we want every single
5 paper you have concerning how much you paid to a process server
6 and going beyond Samserv and asking for other cases where it's
7 a clear fishing expedition. These other process servers are
8 not part of the case. There is no issue of service of these
9 other process servers.

10 MS. WILNER: Your Honor, I don't know that it's so
11 clear that there are no issues concerning service with other
12 process servers. It relates to another issue that we would
13 like to discuss a little later, but Mel Harris used other
14 process servers in addition to Samserv on behalf of the
15 Leucadia defendants and all of that information is relevant to
16 our claims.

17 THE COURT: We have to put some kind of restraint on
18 this. The objections are sustained in part, overruled in part.

19 The request for every piece of paper relating to
20 payments is too broad. I think there should be information
21 provided only with respect to Samserv, not other process
22 servers, and answers to questions of what Mel Harris paid
23 Samserv. I am not striking the request for all documents. For
24 example, if there is a contract or a document or something that
25 lays out the relationship in terms of the prices, the pricing,

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1 that should be produced. I think something that advises of the
2 overall amounts, I think that could be relevant and should be
3 produced. But we don't need every individual check or invoice
4 or letter back and forth for transmittal. And I think for the
5 class period also.

6 Next.

7 MS. WILNER: We have requested from the Mel Harris
8 defendants their communications with the Leucadia defendants,
9 with the Samserv defendants, and with two other companies,
10 Rushmore Recovery Management, which is a non-party but it's the
11 third partner in the joint venture, and Metcap Securities,
12 which is the broker that was involved in the purchasing of the
13 portfolios, and the Mel Harris defendants have simply refused
14 to turn over any of their communications with co-defendants or
15 these other two companies.

16 MR. SCHER: Your Honor, first I would say that is
17 inaccurate. With respect to the objection, the objection has
18 always been that we have asked the plaintiffs' counsel for
19 months to narrow it down, not simply ask for every single
20 communication we ever had with each of these entities. To the
21 extent they limited it and they did -- for example, they asked
22 for all communication between Mel Harris and Leucadia
23 concerning the financials. We produced thousands of pages of
24 excel spread sheets detailing every single payment on a weekly
25 basis that went back and forth, detailing which debtors paid

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1 their bills that month, how much was collected, how much was
2 forwarded to Leucadia. That was all in tremendous size Excel
3 spread sheets. To say we haven't produced anything is a
4 mischaracterization of what has been produced. They narrowed
5 it down, give us all the financial documentation showing the
6 monies, and it's highly privileged and we produced them. They
7 were produced under the confidentiality badge but to say we
8 haven't given them anything is not right. Narrow it down to
9 some paper other than every single piece of paper that has been
10 exchanged between these two companies is all we asked.

11 MS. WILNER: When we asked counsel how many
12 communications there were he stated that he had not even asked
13 his clients to check how many documents there were. We have no
14 idea if this request is even burdensome at all and our
15 understanding is it seems like there is a small group of
16 individuals at each company who are actually involved in
17 conversing with each other.

18 THE COURT: There must be lots of communications that
19 are totally irrelevant. Enclosed is a copy of this document
20 you requested or enclosed is a copy of -- you know, these
21 transmittal things, is there a way of -- particularly when you
22 are dealing with this kind of volume, there must be lots of
23 communications. Is there a way of narrowing this?

24 MS. WILNER: Your Honor, I am not even sure that there
25 is a large volume of communications at issue here and it's hard

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1 for us to narrow --

2 THE COURT: Is there a large volume of communications?
3 Have you looked?

4 MR. SCHER: Yes, there is. Just the log we produced
5 was thousands of pages of documents.

6 MS. WILNER: I don't know what is the volume aside
7 from the spread sheets that they have already produced. It
8 might be possible for us to narrow the request but without any
9 input from them as to what is the burdensomeness problem, why
10 can't they search and produce these things? It's very hard for
11 us to be able to narrow the request.

12 THE COURT: I don't have a quarrel with the refusal to
13 turn over every piece of paper just because you asked for it.
14 Even if it's not hard I don't disagree with that sentiment.
15 There should be some kind of more targeted approach it seems to
16 me.

17 I think the request for every communication is overly
18 broad. I think the plaintiffs should narrow the requests and
19 try to make them somewhat more targeted and substantive and try
20 to work something out.

21 MS. WILNER: It may be possible to narrow the request
22 to cover, for example, the key people at each organization who
23 were responsible for the deal.

24 THE COURT: I think it should be more than just the
25 names of the individuals. Look, I don't know what you are

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1 going to do with all these things either. Every transmittal
2 letter? I mean, here are ten cases, and I don't know how it
3 works but if they send over ten cases and they say please file
4 these ten cases for us, do you want all of those? And if that
5 happens 20 times a week, do you want all of those? It means
6 collecting them, photocopying them, making multiple sets,
7 stamping them. It's still a fair amount of work. It might be
8 easier to gather them, but I don't know.

9 MS. WILNER: It seems the transmittal letters would
10 largely accompany these spread sheets that they have already
11 produced.

12 THE COURT: The objection is sustained on the grounds
13 that the request for every communication is overly broad. I
14 will leave it up to you to try to narrow it and to try to work
15 it out, and if you can't you will have to come back to me, but
16 I am not going to sit here and try to imagine or rewrite the
17 requests for you.

18 Next.

19 MS. WILNER: We have requested from the Mel Harris
20 defendants documents that they have provided in response to a
21 request for subpoenas by the U.S. Attorney's Office and the New
22 York State Attorney General's office and the basis for this is
23 that we know that the New York State Attorney General has
24 subpoenaed documents from Mel Harris in connection with their
25 ongoing investigation of sewer service among different process

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1 serving agencies and the Mel Harris defendants have responded.
2 We think that the information --

3 THE COURT: The request is you just want whatever they
4 produced in response in these requests?

5 MS. WILNER: Yes.

6 THE COURT: And both organizations are conducting
7 investigations on sewer service, is that your understanding?

8 MS. WILNER: I am really not sure of the nature of the
9 investigation by the U.S. Attorney's Office. The New York
10 State Attorney General's investigations have centered around
11 sewer service.

12 THE COURT: How do you know that?

13 MS. WILNER: We have received through a FOIA through
14 the Attorney General's office information in general about the
15 investigations and some of the results of it, but a lot of the
16 information that we have received through FOIA is extremely
17 redacted and so it's not useful for us in terms of, for
18 example, comparing patterns of sewer service with the patterns
19 we see in our case. And, also, the FOIA only covers
20 investigations that are actually completed and there may be
21 other ongoing investigations that aren't completed with the
22 U.S. Attorney's Office yet and so we would like those
23 documents. We are not asking them to do anything new but
24 simply to produce what was already produced to these agencies.

25 THE COURT: What is the objection?

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1 MR. SCHER: The objection is that the demands are
2 actually -- there are two they provide in the one. The first
3 demand was documents provided in response to any request or
4 subpoena from the U.S. Attorney's Office or the New York State
5 Attorney General and our objection to that was twofold. One is
6 that just like the plaintiffs have objected to our subpoenas
7 that we have served and information we sought with respect to
8 background information on the plaintiffs, which your Honor
9 quashed at the beginning of the case, asking for any complaints
10 that our clients have or any request to the Attorney General
11 goes well beyond the scope of sewer service.

12 In fact, the plaintiffs, and this was a issue we had
13 in the case a few months ago, instead of serving the subpoena
14 on the Attorney General's Office they used a FOIA request,
15 didn't put us on now, but they got 3000 pages of documents from
16 the New York Attorney General. And going through the
17 complaints you can see why they are non-responsive. It's
18 individuals. They are not talking about sewer service. It's
19 in the nature of the business of being in debt collection that
20 you get people who go to the Attorney General's Office at
21 consumer frauds and complain about the fact that the bank
22 account has been attached.

23 I just went through the first 30 pages of what they
24 produced to us after we requested it and the New York Attorney
25 General's Office deals with requests saying it's not me,

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1 somebody else, and they go through and say this debt does not
2 belong to me. It was somebody else who co-signed and I am now
3 on the hook. It has nothing to do with sewer service.

4 To the extent they are saying they have information
5 that the Attorney General is investigating my client with
6 respect to sewer service, that is news to my client because
7 they are not aware of a sewer service investigation of them by
8 the Attorney General's Office. To the extent --

9 THE COURT: The second objection?

10 MR. SCHER: The second demand actually went into where
11 they said they wanted specifically documents pertaining to
12 complaints that were filed against Mel Harris' firm with
13 respect to allegations of process servers who failed to comply
14 with process-serving requirements. To the extent we didn't
15 object to that and to the extent we don't have documents
16 because, as I just said, as far as we know Mel Harris is not
17 under investigation by the New York State Attorney General's
18 Office for sewer service.

19 THE COURT: Are there any documents containing
20 complaints against Mel Harris regarding sewer service?

21 MR. SCHER: As far as we know there are not. We have
22 a stack of documents that deal with that and are not issues of
23 sewer service but debtors who are upset about the bill payment
24 collection process and don't want to pay the bills for whatever
25 reasons talking about issues beyond that.

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1 THE COURT: The objections are sustained. I am not
2 going to order the production of all documents submitted to the
3 U.S. Attorney and the Attorney General's office except that to
4 the extent there are documents that relate to complaints of
5 sewer service they are to be produced. If there are none, then
6 there should be a representation from someone from Mel Harris
7 to that effect, that a review has been conducted and that no
8 documents relating to complaints of sewer service were produced
9 to the two government agencies.

10 Next.

11 MS. WILNER: I am sorry, may I ask a clarifying
12 question?

13 THE COURT: Yes.

14 MS. WILNER: You said that the Mel Harris defendants
15 should produce copies of complaints related to allegations of
16 sewer service?

17 THE COURT: Correct.

18 MS. WILNER: There is another part of our case which
19 has to do with the false affidavits of merit that the
20 defendants filed in order to get default judgments and if there
21 are complaints that relate to that, or similar allegations, we
22 would like to request those as well.

23 THE COURT: I guess that is a little bit thornier
24 because it's murkier. What constitutes a complaint regarding a
25 false affidavit of service? If someone is saying I didn't owe

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1 the money, is that a complaint that goes to a false affidavit
2 of service?

3 MR. SKLAR: That would be the false affidavit of
4 merit.

5 THE COURT: I meant merit. I meant does a client to
6 the effect that they came after me even though I didn't owe
7 them money, is that construed as a complaint regarding a false
8 declaration of merit? I guess we should clarify that.

9 MR. SCHER: Your Honor hit it on the head. How do you
10 a search? Plaintiffs have shown my clients deal with
11 complaints on a daily basis. That is what happens. To look
12 through and find was this one dealing --

13 THE COURT: Let me do this: Modified to the extent
14 that Mel Harris shall also produce any copies of documents that
15 relate explicitly to complaints about false affidavits or
16 declarations of merit, so that general complaints are not
17 construed to go to those declarations of merit.

18 What is next?

19 MS. WILNER: I just had one more clarifying question.
20 I am sorry because I may have just missed this, but to the
21 extent that Mel Harris was served with subpoenas by the U.S.
22 Attorney's Office or the Attorney General's office and they are
23 specifically requesting documents pertaining to an
24 investigation of sewer service, you ruled that Mel Harris does
25 not have to produce those documents?

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1 THE COURT: I have ruled that Mel Harris is obligated
2 to produce documents relating to complaints of sewer service
3 and as modified to include documents that explicitly address
4 the question of false declarations of merit that were produced
5 to the U.S. Attorney or the Attorney General in response to
6 whatever subpoenas they served.

7 MR. BRINCKERHOFF: And any informal request? Because,
8 as we know, governmental agencies usually because they
9 resort --

10 THE COURT: As part of their investigation, whether
11 formal or informal, that were produced.

12 MS. WILNER: Because much of what was produced to
13 these government agencies, as I understand it, is like a spread
14 sheet, an electronic spread sheet that has records of service.
15 Is that part of what the defendants would be required to
16 produce?

17 THE COURT: I don't know what it is.

18 MR. SCHER: We don't know. If it's a spread sheet
19 that is responsive to what your Honor directed we will produce
20 it. I wouldn't parse between electronic --

21 THE COURT: If you have to show -- well, show me the
22 document if you can't work it out. I have tried to give you
23 guidance. Try to work it out.

24 What is next?

25 MS. WILNER: With regard to one of the plaintiffs,

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1 plaintiff Armoogam, we had requested from defendants their
2 complete files concerning this plaintiff, and actually
3 concerning all the plaintiffs, and they produced complete and
4 unredacted files for three of the plaintiffs but for the fourth
5 plaintiff, Armoogam, they have not produced the collection
6 notes for their computer system and they have stated that every
7 single collection note is covered by attorney-client and/or
8 work product privilege and we think that this is overbroad.

9 THE COURT: They were produced for the other three?

10 MS. WILNER: They were produced for the other three.

11 Let me say at the outset that these collection notes do not
12 contain attorney-client communications. They are internal
13 collection notes that the Mel Harris firm uses to collect
14 debts. There is definitely no communications with clients
15 there. It's not a computer system they used to communicate
16 with each other, and they also were not in the habit of
17 speaking with each other about individual cases, so there
18 really wouldn't be a need for communications in these files.

19 THE COURT: What is the objection?

20 MR. SCHER: The objection is on work product. It
21 seems my clients since they are in the industry of debt
22 collection that they are apparently no longer a target. What
23 they are talking about is these collection notes or or.

24 THE COURT: Why were they produced for the other
25 three?

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1 MR. SCHER: They were produced on closed files. This
2 is an active file and that was before plaintiffs made the
3 demand they were going to be asking for it. The segue is they
4 will ask for 100,000 of every one of these produced wholesale
5 of my clients attorney notes.

6 MS. WILNER: If I may, your Honor, this is not an
7 active file. This is also a closed file, like the other files,
8 and most of these notes are really not reflective. I don't
9 know if any of them are reflective of opinion work product. A
10 lot of them are automatically entered by the computer system to
11 note when an action was taken.

12 THE COURT: The objection is overruled. As for this
13 one individual the collection notes are to be produced.

14 MR. SCHER: Can we clarify that is not going to be
15 used by plaintiffs as a basis to produce 100,000 other files?

16 THE COURT: I will cross that bridge when I get there.
17 We are at a point where I am not going to expand discovery into
18 100,000 other files.

19 MS. WILNER: That brings me to the next point, your
20 Honor. We requested a number of documents from the Mel Harris
21 defendants' data base. You may recall we had this discussion
22 at the last discovery conference and your Honor ordered us to
23 work out a compromise and there were four tables that we had
24 asked to be produced, one of which was the notes field. At
25 this point the Mel Harris defendants have produced everything

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1 except the notes field.

2 THE COURT: You are talking about others now?

3 MS. WILNER: For the class members. I am just raising
4 this sort of to flag the issue because we feel we might be able
5 to do it without the notes field.

6 THE COURT: Let's leave it without prejudice.

7 MS. WILNER: Thank you very much.

8 THE COURT: What else?

9 MS. WILNER: We recently served a small amount of
10 discovery demands and the Mel Harris defendants refused to
11 produce any information in response to those demands. One of
12 the things we asked for was communications between the Mel
13 Harris defendants and the assigners of the debt. So, in other
14 words, the entities we purchased the debts from we would like
15 communications that pertain specifically to requesting
16 additional documentation of the debts, and this is because when
17 they buy these debts they don't buy any account documentation,
18 contracts, account statements or any of the rest of it, and
19 part of our case is an allegation that not only do they not
20 have those documents at the outset but they never get them at
21 any point of the litigation. And the information about where
22 and under when and under what circumstances they would request
23 these documents is relevant and we have requested it and they
24 refused to produce it. We are seeking information about how
25 often they actually requested these documents, how often they

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1 actually received them, if ever, as well as how much they
2 typically paid for them.

3 THE COURT: Any objection?

4 MR. SCHER: The objection is, first of all, it deals
5 with relevance and this was part of what I hoped to discuss in
6 a few minutes with respect to the motion for class
7 certification in terms of the fact that there has been now a
8 court decision talking about the issue of commencing lawsuits
9 without documentation and using the affidavit of merit which
10 our clients used as being completely legitimate and not a
11 violation of the FDCPA. I updated that decision, Hasbrook, out
12 of the Northern District of New York, which came out when I was
13 Shepardizing cases to prepare for this morning, and I think
14 that is privileged and I am happy to discuss that later.

15 In terms of dealing with the scope, again we are
16 dealing with 100,000 plaintiffs --

17 THE COURT: Listen, I don't think I would order at
18 this point the production of all those documents. I don't
19 know. It seems to me let's leave the issue of producing the
20 documents until you have had your depositions and you can
21 inquire as to generally what kind of follow-up there is, how
22 requests for additional documents are made, how they are
23 responded to, what the volume is of such requests, and let's
24 see where we are.

25 In part we will get there in a bit, but I do have

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1 serious questions about class certification and so let's see
2 where we wind up.

3 So the request for documents is denied -- these
4 additional communications with assigners of the debt regarding
5 requests for additional documents -- without prejudice to
6 renewal later on, but if you have depositions the plaintiffs
7 are free to inquire as to the general practices.

8 What is next?

9 MS. WILNER: One last item with the Mel Harris
10 defendants, and that is we had requested in an interrogatory
11 the identities of other process-serving agencies that they used
12 to serve process on behalf of the Mel Harris defendants and
13 also the number of cases that were assigned to each agency and
14 this is just an effort to learn. We know that Samserv is not
15 the only agency that was used to serve process, but who were
16 the other agencies and were they used frequently or only some
17 of the time, and defendants have refused to provide this
18 information.

19 MR. SCHER: Again, your Honor, it's a fishing
20 expedition. The other process servers are not part of this
21 case. To identify these process servers so plaintiffs can drop
22 subpoenas on them and harass them, it's a harassment issue at
23 this point.

24 THE COURT: The objection is overruled in part and
25 sustained in part. At deposition you can inquire into

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1 generally the use of other process servers, how many are used,
2 percentage of cases, Samserv versus the others. I am not going
3 to require that they be identified at this time without
4 prejudice to renewal at a later point.

5 What else?

6 MS. WILNER: There are a number of outstanding issues
7 with the Leucadia defendants and the Samserv defendants.
8 However, the parties have conferred and I think we have reached
9 agreement on all of them that the defendants are looking for
10 documents and they are going to produce them if found.

11 Our only issue is that some of these requests have
12 been outstanding now for 6 months and we haven't actually seen
13 the production. We are just requesting a date certain by which
14 defendants will produce documents and we are happy to hear from
15 the defendants on how long they think they need to do that.

16 MR. SKLAR: That is not 100 percent accurate, your
17 Honor, because even referring to the letter, which I assume is
18 plaintiffs' last word on the subject, they are still asking for
19 some of the same issues that your Honor just overruled in
20 connection with the Mel Harris defendants.

21 THE COURT: Unless there is a reason to distinguish,
22 my rulings would apply to the other defendants as well.

23 MR. SKLAR: Thank you, your Honor.

24 THE COURT: I don't know if there is any reason to
25 distinguish on any of my particular rulings.

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1 MR. GOLDFARB: On behalf of the Leucadia defendants I
2 thought Ms. Wilner and I actually worked out an understanding
3 with regard to the document requests that began in March of
4 this year. There was a disagreement as to the breadth of it.

5 THE COURT: She suggested it was worked out except for
6 a date.

7 MR. GOLDFARB: These are not overdue by months.

8 THE COURT: When can you produce these additional
9 documents?

10 MR. GOLDFARB: There are several different categories
11 and there are disks with about 5,000 pages of documents. I
12 think within the next 4 to 6 weeks, your Honor.

13 THE COURT: 4 to 6 weeks.

14 MS. WILNER: There is not that much time in discovery.
15 We have many depositions we would like to take and we don't
16 want to take all of our depositions before getting the
17 documents, so as soon as they can be produced.

18 THE COURT: The defendants shall produce the remaining
19 outstanding documents 4 weeks from today, no later.

20 Any other discovery issues?

21 MS. WILNER: That is it, your Honor.

22 THE COURT: Class certification, who is going to
23 argue? I am listening.

24 MR. BRINCKERHOFF: Judge, there have been a few issues
25 that have been hit upon here and I obviously don't want to just

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1 go over --

2 THE COURT: Let me give you some general thoughts.

3 On the one hand the question of whether someone has
4 been served with process is a highly individualized situation
5 and usually you have an inquest. How do you prove these things
6 individually? It's not the type of thing that is conducive to
7 a class approach in some respects. On the other hand, there
8 are these statistics that seem to be compelling circumstantial
9 evidence of sewer service. Mr. Andino was in 9 different
10 places on March 29, 2007 at 4 p.m. according to what the
11 plaintiffs say; that he served process in two or more places at
12 the same time, 327 times. The defendant Mosquera did this 124
13 times.

14 Those seem like compelling arguments that there was
15 sewer service, which tends to support class treatment. On the
16 other hand, I think the defendants correctly point out that the
17 proposed class definition is too broad. It includes all
18 debtors that were sued or will be sued going into the future,
19 where a default judgment was or will be obtained. It's not
20 limited to debtors who were served by sewer service. I think
21 that is a fair question. But, then, how do you determine
22 whether someone was served by sewer service?

23 So my mind is not made up. Frankly, my law clerk
24 recommended denying the class certification motion but she has
25 left me. For better or worse she has left me. But there are

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1 decent arguments both ways. Another question is, I can't
2 remember his name now, but the guy who does the declarations of
3 merit. I haven't personally read his deposition, but should we
4 have a hearing and should I hear from him live? Under the IPO
5 case we are supposed to make factual findings.

6 Would it be more instructive, more useful for me to
7 actually hear from him? The same could be said of Mr. DeJesus.
8 There is a lot that he doesn't say. Apparently there are
9 114,000 cases involving the Leucadia defendants. He doesn't
10 say how many are default judgments. He doesn't say how many
11 were Samserv. He doesn't say in how many Mel Harris was
12 counsel. He doesn't say how many were sewer service and there
13 is probably no way to tell.

14 How do we determine who is a class member? Samserv is
15 the only process server named but yet -- process-serving
16 company I should say -- but apparently the proposed class would
17 pick up individuals served by others. I don't know if that is
18 appropriate. The defendants do a good job of pointing out how
19 the plaintiffs have offered conflicting excuses, identity
20 theft, helping Mr. Perez, and these are different situations
21 and the variety of situations doesn't lend itself to class
22 treatment.

23 So these are some of the questions that filled my head
24 as I was reading these papers over the weekend.

25 MR. BRINCKERHOFF: If I may, Judge, I think I can

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1 address hopefully in a compelling way all of the questions.
2 They are understandable questions that you are raising. But
3 the first and most important component of this that I think one
4 has to analyze is there are really two fundamental factual
5 circumstances that we are challenging and making claims upon in
6 this case. The first one is not about service or sewer service
7 or any kind of service. It's about what concededly from the
8 defendants' points of view, and what the record demonstrates,
9 are absolutely uniform affidavits of merit that are submitted
10 and make the same claims in each and every case.

11 THE COURT: I guess this is the point Mr. Scher was
12 raising. What is wrong with that? In other words, why can't a
13 law firm rely on computerized records from a client? The
14 client comes and says all these people owe us money. Here is a
15 printout. Here are the amounts. Why can't a lawyer accept
16 that?

17 MR. BRINCKERHOFF: And to bring a case, I think the
18 lawyer can accept that.

19 THE COURT: And use the same affidavit.

20 MR. BRINCKERHOFF: Let's be clear, it's an affidavit
21 after there has been a default in support of a judgment for a
22 sum certain. It is required by the CPLR and the way that it's
23 filled out is not we think that these things may have happened,
24 although we have no actual evidence and we could never prove it
25 in court. That is what the affidavit says. What the affidavit

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1 says if you look at one, and it's set forth in our reply brief
2 on pages 8 and 9 as well what Mr. Fabacher says, and it applies
3 to every single person we have identified in the class and
4 defined, he says that he is fully and personally familiar with
5 and has --

6 THE COURT: May I have a copy?

7 MR. BRINCKERHOFF: If you look at Exhibit I, they are
8 all basically the same, if you look at my declaration dated
9 August 1, docket number 100.

10 THE COURT: I don't have the declaration.

11 MR. BRINCKERHOFF: I am happy to hand up a copy.

12 THE COURT: If you have one that would be great.

13 MR. BRINCKERHOFF: This one would be slightly
14 different but they are all materially the same. Let me rip one
15 out here. Hang on.

16 This is Exhibit H to my declaration, and I am going to
17 be reading from Exhibit I but they are the same.

18 MR. BRINCKERHOFF: It's an affidavit submitted by
19 Mr. Fabacher. The testimony is he submits the affidavit of
20 merit in each and every case.

21 THE COURT: Just give me a moment and let me take a
22 look. I read the briefs. I didn't look at all the exhibits.

23 (Pause)

24 THE COURT: He does say, "I am personally familiar
25 with and have personal knowledge of the facts and proceedings

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1 relating to the within action." He goes on to say, it's based
2 upon a retail charge account agreement with the bank, what the
3 defendant agreed to do; that is, the defendant agreed to pay
4 all amounts charged to the account. It remains due and owing a
5 certain amount.

6 I have read it.

7 MR. BRINCKERHOFF: And the reason that this is
8 significant is if he put in an affidavit that said what he
9 actually had personal knowledge of they would not be able to
10 obtain a default judgment for a sum certain.

11 THE COURT: The law requires personal knowledge?

12 MR. BRINCKERHOFF: It requires an affidavit supporting
13 the amounts and the claims in the case as opposed to an
14 inquest.

15 THE COURT: Does it require personal knowledge?

16 MR. BRINCKERHOFF: He certainly claims personal
17 knowledge.

18 THE COURT: He claims it.

19 MR. BRINCKERHOFF: That is what is relied upon by the
20 courts.

21 THE COURT: Is this required by a CPLR provision?

22 MR. BRINCKERHOFF: The affidavit of merit, or
23 something like that, it's not called that but it's required by
24 the CPLR provision. The CPLR provision is set forth in a
25 footnote on our reply brief, Footnote 5 on page 5, CPLR 3215

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1 subpart F, which requires proof of the facts constituting the
2 claim, the default, the amount due by affidavit made by a
3 party. And so basically what Mr. Fabacher says here is that he
4 is the custodian of records for the party here, or mine is LR
5 Credit 12. The one I handed up may be different. He says he
6 has personal knowledge that the defendant incurred charges.

7 THE COURT: Who is he anyway? Who does he work for?

8 MR. BRINCKERHOFF: He works for Mel Harris and he is
9 also, from the documents we have seen, a principal of Rushmore,
10 which is one of the two entities along with Leucadia that
11 formed the joint venture that is LR Credit. He was produced to
12 us as a 30(b)(6) witness as the person most knowledgeable of
13 the various electronic and --

14 THE COURT: I have his full deposition somewhere in
15 the record?

16 MR. BRINCKERHOFF: Yes.

17 THE COURT: So the argument is that he must be lying,
18 that in fact he does not have personal knowledge, he is not
19 personally familiar with and that this is a falsified affidavit
20 and that because he is doing this routinely every 8 minutes of
21 the day that this is a way that they are fraudulently getting
22 default judgments against people.

23 MR. BRINCKERHOFF: That is the claim. Two points
24 though so the court is aware.

25 The deposition is a 30(b)(6) deposition limited to

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1 processes. We have not deposed him yet about the affidavit of
2 merit itself. So the record is incomplete on that score. It's
3 not that he may be lying. There is no question from the
4 testimony we have so far, some of it in the 30(b)(6), that the
5 information that he claims to have personal knowledge of he
6 absolutely does not. Obviously this goes to the merits of our
7 claim and if -- --

8 THE COURT: Back to the question I was asking earlier,
9 and that is is it inconsistent with CPLR 3215(F) for someone
10 like Mr. Fabacher to be making these representations? Can can
11 he not rely on --

12 MR. BRINCKERHOFF: He can say I am relying on
13 information and belief.

14 THE COURT: He doesn't.

15 MR. BRINCKERHOFF: He doesn't. And the claims are not
16 about whether the CPLR was violated obviously. The question is
17 were the statements that he made that are relied upon by the
18 court but for which our clients would not be harmed, were they
19 statements that were deceptive under that FDCPA or misleading
20 under the terms of the statute? Are they deceptive or
21 misleading under the GBO? Are they fraudulent under the terms
22 of the mail and wire fraud statutes? And the answer to that is
23 yes.

24 He clearly does not have any knowledge of any of this
25 information. He says at least in mine -- and the fourth

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1 paragraph is instructive. It says that the defendant incurred
2 charges by use of a charge account. He has already sworn that
3 there was an account. That account submitted were remitted to
4 the defendant. They have no debt account statements. They
5 have no clue whether it happened. That he defaulted in the
6 payments. All they have is a one-line entry on an Excel spread
7 sheet.

8 THE COURT: Does that entry contain all the
9 information?

10 MR. BRINCKERHOFF: It contains none of the
11 information.

12 THE COURT: Where is he getting the information from?

13 MR. BRINCKERHOFF: I don't know. I honestly don't
14 know. My surmise is he is assuming since he has been told when
15 they purchase the debt that the debt was due and owing and all
16 these other things happened, and if need be they perhaps can in
17 some circumstances get documentation that supports it and in
18 other circumstances they are prohibited from getting
19 documentation that supports it.

20 THE COURT: I am running out of time. Why don't you
21 sit. I want to hear from the other side on the affidavit of
22 merit. I want to do this issue by issue.

23 This is troubling. First of all, he is not actually
24 affiliated with an employee or agent of the party other than
25 being affiliated with the law firm and he says I have personal

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1 knowledge.

2 MR. SCHER: He prefaces that, and the first line of
3 the affidavit says, "I am an authorized and designated
4 custodian of records for the plaintiff." The plaintiff is LR
5 Credit. The plaintiff is not the underlying creditor. It's
6 clear, and in the next paragraph he says the plaintiff, in this
7 case LR, looking at Exhibit I to our motion which attached one
8 of his affidavits, he explains that LR Credit is an assignee
9 and a purchaser of the account number that was owed to Chase
10 Bank and they are collecting on that account. This case is a
11 right line -- I apologize I sent this to you last night. I
12 just found it. This Hasbrook case is directly on point with
13 these facts and the issue is is that plaintiffs are saying that
14 the affidavit of merit implies that he had statements or he had
15 individualized records. Hasbrook goes directly into that
16 argument and the court did a great job of explaining away the
17 fact that when you look --

18 THE COURT: I gather there are no individualized
19 records?

20 MR. SCHER: On two of these cases there are. The
21 plaintiffs' whole claim that we, Mel Harris, can't get back-up
22 is belied by two of the plaintiffs when we have every single
23 statement of those accounts. They are in there. To the extent
24 the plaintiffs claim we can't get these it's absurd. In two of
25 the four plaintiffs they acknowledge --

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1 THE COURT: How do you respond to the argument that
2 this is deceptive because the representation that is being made
3 to the court about all of these facts that Mr. Fabacher
4 actually knows to be true?

5 MR. SCHER: The troubling part about that is
6 plaintiffs are not discussing that the affidavit complies with
7 what was required by the court system. In fact, in Exhibit J
8 to our motion we attach the directive from the civil court
9 which explains the civil court's understanding. To quote the
10 civil court's directive, it says --

11 THE COURT: What exhibit is that?

12 MR. SCHER: Exhibit J to my declaration. The court
13 explains in there, to paraphrase, we understand that there is a
14 debt-buying industry. We understand how it works. We
15 understand these debts are bought and sold and transmitted
16 electronically and they put out and lay forth what you need to
17 do and it lays out the affidavits that need to accompany this
18 motion. There is nothing that requires him, Mr. Fabacher, to
19 state that he has personal knowledge and what is required --

20 THE COURT: But he does say it.

21 MR. SCHER: Based on the records, which is electronic.

22 THE COURT: He didn't say on information and belief.

23 MR. SCHER: He has electronic records. Plaintiffs'
24 issue is we don't have when we filed this case we don't have
25 the actual statements.

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1 THE COURT: You are saying the electronic records are
2 enough.

3 MR. SCHER: Exactly.

4 THE COURT: That is what Hasbrook says.

5 MR. SCHER: Yes, I have the quote.

6 THE COURT: I will find it.

7 MR. SCHER: The other thing that plaintiff is ignoring
8 is what the civil court requires, starting in 2009, affidavits
9 of the debt seller and the original creditor, both of which
10 were provided with respect to the cases, which was
11 Mr. Armoogam's case. Also, that is part of Exhibit I to my
12 motion.

13 THE COURT: So for these others, this is a 2009 one
14 that I have.

15 MR. SCHER: It has to deal with cases starting before.

16 THE COURT: Got you.

17 MR. SCHER: The problem I have is to the extent the
18 plaintiffs claim that we can't get documentation, two out of
19 the four plaintiffs we actually went and got the documentation
20 and have it. So it's in the motion papers. To say we couldn't
21 get it and his affidavit was false because Mel Harris can never
22 get the back-up documentation is just inaccurate and to the
23 extent that they are claiming they were misled that is an
24 issue, a legal issue we have addressed in our brief which is
25 that, first of all, each of the plaintiffs admitted during the

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1 deposition they never saw the affidavit of merit. They
2 acknowledge they never saw the document. Even before the
3 deposition they never saw the document.

4 To the extent what plaintiffs' claim is based upon
5 that we misled the court, and that goes to the recent decision
6 in O'Rourke, which is a Seventh Circuit case, but in O'Rourke
7 the court said the FDCPA was created to protect debtors, not to
8 protect against deception on the court. If an affidavit
9 misled, and I am not in any way conceding this affidavit was
10 misleading and as the fact that the civil court never once
11 objected to one of these affidavits and said this is a problem,
12 I think it shows there was no misconception by anyone in the
13 court system that this affidavit complied with what it needed
14 to.

15 THE COURT: Do the defendants want to add anything at
16 this point?

17 MR. BRINCKERHOFF: If I may, Judge, a couple of
18 points. One, the most salient one being this is exactly why
19 this case needed to be brought. It is going to be resolved.
20 We believe very strongly these are affirmative
21 misrepresentations and fraudulent statements that were known to
22 be false when they were made.

23 THE COURT: Is it true that the individual debtors do
24 not rely on these things and that --

25 MR. BRINCKERHOFF: This is submitted to a court after

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1 a default. It's true the individual alleged debtors, the
2 defendants in these cases have no knowledge of them when they
3 are made but individualized reliance is not a component of an
4 FDCPA claim, a GBL claim or a RICO claim.

5 THE COURT: The theory is that, in fact, the
6 plaintiff, whoever the plaintiff is in these cases, does not
7 have the documentation and that it's not adequate to rely just
8 on the electronic information?

9 MR. BRINCKERHOFF: The primary allegation is the
10 electronic information contains no support for any of the
11 material representations made in this affidavit and so it's
12 absolutely insufficient.

13 THE COURT: Do we have a search in the record of what
14 the electronic information looks like?

15 MR. BRINCKERHOFF: We have a description of the
16 information in the brief. We can get you a more specific cite,
17 and we also have in, again, Mr. Fabacher's deposition, he
18 explained exactly the types of information.

19 THE COURT: Do we have an exhibit what he looks at?

20 MR. BRINCKERHOFF: No, because those are the --

21 THE COURT: Does he look at anything?

22 MR. BRINCKERHOFF: We know the universe of everything
23 they have at the time that he makes this sworn statement and we
24 know that that consists of the following: The name of the
25 alleged debtor, the amount that is allegedly owed.

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1 THE COURT: Where is he getting that information?

2 MR. BRINCKERHOFF: It comes in an Excel file with one
3 line containing information about each individual debt.

4 THE COURT: What I want to know is if there is a copy
5 of that Excel page in the record somewhere so I can see what he
6 looks at?

7 MR. BRINCKERHOFF: That has never been produced to us
8 in discovery.

9 THE COURT: Is there such a thing?

10 MR. SCHER: There is such a thing. It's not part of
11 the motion but I would be happy to supplement it. It has been
12 produced. It's part of the depositions.

13 THE COURT: I would like to see what he is looking at
14 or is he looking at anything? Did he explain? Is he looking
15 at something or just looking at the things handed to him to
16 sign?

17 MR. BRINCKERHOFF: We didn't depose him on this
18 process. We know what the factual information that the
19 plaintiff and the plaintiffs' lawyers have when this is filled
20 out. I do not know what exactly Mr. Fabacher's process is,
21 although the speed in which it is done does create some
22 questions.

23 THE COURT: I am curious as to when he is signing this
24 affidavit of merit what is he looking at? What information
25 does he have? What is he looking at in his 8 minutes per file?

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1 If it's not in the record, it's not in the record. But that is
2 something that I think would be useful to me.

3 MR. BRINCKERHOFF: I agree it goes to the heart of the
4 case. It will go to the heart of whether we win or lose on
5 this claim.

6 THE COURT: Let's move on to the other one. Finish
7 up.

8 MR. BRINCKERHOFF: Whether or not it's a winning claim
9 or a losing claim is not the issue on class certification. The
10 only question is can it be resolved in a way that is binding
11 upon everybody in the class as defined, and the answer to that
12 is absolutely yes because we defined the class to be only
13 people who had a default judgment entered against them by
14 Leucadia as a plaintiff with Mel Harris as the lawyers. And so
15 that by itself is absolutely --

16 THE COURT: I understand the points. The rules have
17 changed after IPO. In the old days if it was in the ballpark
18 you would certify. We can't do that anymore. Now it has to be
19 a more rigid analysis and you have got to prove it.

20 MR. BRINCKERHOFF: We clearly have the burden to show
21 these can be resolved on a common basis and that there are
22 common questions that predominate and we have satisfied that
23 burden. The closer question is certainly the affidavits of
24 service, which I would be happy to address if you want to move
25 on to that.

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1 THE COURT: I want to move on.

2 MR. BRINCKERHOFF: On the affidavit-of-service issue
3 the court is correct that depending on the circumstances of an
4 individual case this may or may not be an appropriate issue for
5 (B)(3) certification. On (B)(2) certification I don't think
6 it's a very close call, which is why just for the record the
7 reason the class is defined with a prospective component is
8 because we are seeking prospective injunctive relief as part of
9 the relief we want for the (B)(2) class and the class under
10 (B)(1)(a) that we are also seeking concurrent certification on.
11 That is the only reason it has that forward-looking component.
12 It's not an attempt to do anything more nefarious than to make
13 sure that it's clear we are seeking that relief.

14 On the affidavits of service themselves what we have
15 found so far is that there are at least two ways that we
16 believe will make it entirely possible to resolve this for each
17 and every plaintiff in the class as it has been defined. One
18 is that the defendants --

19 THE COURT: For each class member you mean.

20 MR. BRINCKERHOFF: For each class member, I am sorry.
21 The first one is that the defendants are required to keep log
22 books of each and every service of process, log books that
23 would allow us to inquire into what the contemporaneous record
24 is about service itself. Those log books somehow have been
25 destroyed or lost or may never have existed. There is no

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1 question that we have the right to request from the court
2 relief for spoliation on that ground that ranges from a factual
3 finding that none of the affidavits of service are reliable to
4 at least an inference that the fact finder can take into
5 consideration in determining whether or not we have made out a
6 case proving that they never --

7 THE COURT: If --

8 MR. BRINCKERHOFF: -- actually served process.

9 THE COURT: When I start talking stop mid-word.

10 Is it correct that for some of the individual process
11 servers there have been zero log books produced?

12 MR. BRINCKERHOFF: We have not seen a single log book.

13 THE COURT: You haven't seen a single one even though
14 they are required by law?

15 MR. BRINCKERHOFF: And even though the court ordered
16 they be produced in June.

17 THE COURT: What is the explanation?

18 MR. SKLAR: Class periods beyond 2005 --

19 THE COURT: Do any exist?

20 MR. SKLAR: The three individual servers have told me
21 they don't have the log books. Some have not been serving
22 process for years. There is no reason to have the log books.
23 To make the argument that the absence of evidence is evidence
24 of absence is a leap you can't make.

25 THE COURT: So the answer is you have not produced a

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1 single log book and you are not --

2 MR. SKLAR: I don't have a way to produce this, your
3 Honor, I don't.

4 THE COURT: They don't exist.

5 MR. SKLAR: The three individual process server
6 defendants have advised me --

7 THE COURT: Only three individual process servers now?

8 MR. SKLAR: Yes.

9 THE COURT: Did they all stop?

10 MR. SKLAR: I believe one of them is still working and
11 I am trying to get what his story is, your Honor.

12 THE COURT: You agree that by law they are required to
13 maintain log books and that they must keep them for 2 years.

14 MR. SKLAR: Yes, your Honor. They are required to do
15 that, the individual.

16 THE COURT: If they don't they theoretically are at
17 risk for losing their licenses.

18 MR. SKLAR: Yes, and if there is a Travers hearing
19 then the Travers hearing may go against the plaintiff, in other
20 words, the party trying to seek the debt, nothing to do with
21 sewer service.

22 THE COURT: The three in question worked for Samserv?

23 MR. SKLAR: Independent contractors, some worked for
24 Samserv and others as well.

25 THE COURT: That seems to be the general practice,

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1 that the process servers are independent contractors.

2 MR. SKLAR: Yes, that is across the industry.

3 THE COURT: Okay. Go ahead.

4 MR. BRINCKERHOFF: In June Mr. Sklar represented that
5 his clients, meaning those three defendants, did not have log
6 books and he would provide affidavits swearing they have no log
7 books. We have received one but not any affidavit from the
8 other two.

9 THE COURT: Let's get the affidavits from the other
10 two.

11 MR. SKLAR: I am trying.

12 THE COURT: You say you are trying. Are they not
13 being cooperative?

14 MR. SKLAR: Two of the three no longer work for
15 Samserv.

16 THE COURT: Are you representing them?

17 MR. SKLAR: Yes.

18 THE COURT: Have you been in touch with them?

19 MR. SKLAR: Intermittently, yes. I will get them,
20 your Honor.

21 THE COURT: It is hereby ordered that the two
22 individual process servers in question are to provide an
23 affidavit explaining what the story is with respect to the log
24 books, whether they kept them, and, if so, whether they have
25 them, and if not, why not, within two weeks from today, and

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1 write them a letter and tell them it is a court order and
2 include in the letter that the court has advised that they are
3 subject to being held in contempt, including the remedy of a
4 default judgment, if they do not respond with an affidavit.

5 MR. SKLAR: Yes, your Honor.

6 THE COURT: Okay.

7 MR. BRINCKERHOFF: The other point that is related to
8 this is there is certainly a local law obligation to maintain
9 the log books because they are critical for the way the whole
10 system functions, but there is also obviously a litigation
11 reason. We filed this case in 2009. I am sure my able
12 adversaries sent out whole letters to make sure that no
13 documents that were relevant were destroyed. I am sure they
14 know --

15 THE COURT: I am sympathetic on this. How does it
16 relate to whether I should certify the class?

17 MR. BRINCKERHOFF: It's one of two basic points as to
18 how this issue, the affidavits-of-service issue can be resolved
19 on a group and classified basis. The first way is based on
20 everything we know to date we don't believe there are log
21 books, that they were never kept or been destroyed, and we
22 would be entitled to a spoliation finding or at minimum an
23 adverse inference that a fact finder will be able to consider
24 in determining whether we made out a case that no process has
25 been served for any of the class members.

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1 The second reason is also set forth in our papers and
2 it involves the fact that each and every process server that
3 served process on any Mel Harris case for Leucadia that was
4 employed by Samserv as an independent contractor or otherwise,
5 they have now produced evidence that indicates that they have
6 made sworn false statements under oath to a court. And based
7 on that evidence alone we are allowed to ask for an instruction
8 to any fact finder or fact finder as a court is allowed to take
9 into consideration repeated material false statements that are
10 filed in court in reaching the conclusion that none of the
11 statements made by any of these process servers are reliable
12 and --

13 THE COURT: I think these things go to evidence, what
14 happens at trial. How does it relate to class certification?

15 MR. BRINCKERHOFF: The reason is, as I said, I agree
16 with you we understand that if the case on the affidavits of
17 service, setting aside affidavits of merits, and it was only
18 about affidavits of service, and we had to have an individual
19 hearing in each and every one of the 100 some thousand cases
20 that are involved here, that that --

21 THE COURT: You are saying we don't need to get there
22 because the affidavits are false on their face and if they are
23 stricken the default judgment should be set aside.

24 MR. BRINCKERHOFF: Rule 23 requires is there a way to
25 get a common resolution of the claims and the answer on this

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1 particular claim under these facts is yes and, secondly, yes,
2 IPO changed the landscape. Yes, there have been many changes
3 under Rule 23, but certainly under Rule 23 still in the
4 portions that are cited in our brief --

5 THE COURT: If there are 120,000 potential class
6 members you are saying I should strike 120,000 false statements
7 or false affidavits of service in one fell swoop?

8 MR. BRINCKERHOFF: We obviously haven't completed
9 discovery. What we know is it's probably -- we know there are
10 100 some thousand cases filed. We are only suing the ones
11 where there were default judgments. We don't know what the
12 rate was but it was something in the order of 60, 90 percent of
13 the cases but, yes, that is certainly a possibility. But this
14 is an area of discovery.

15 THE COURT: You are saying we never need to get to the
16 individualized inquest, and on the face of it it just doesn't
17 seem plausible that all these affidavits are out. Suppose some
18 of them are truthful?

19 MR. BRINCKERHOFF: Well, is that possible? I don't
20 know yet. What I know is at this stage of the litigation when
21 we are determining whether or not a class should be certified
22 and you combine the following things, you combine the fact the
23 affidavits of merit are uniform and subject to Rule 23(b)(3)
24 treatment so we should be proceeding --

25 THE COURT: I understand the points. We have to move

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1 along.

2 Let me hear from --

3 MR. BRINCKERHOFF: Your Honor --

4 THE COURT: You are not following my instruction to
5 stop talking when I start talking.

6 Let me hear from defense counsel.

7 MR. SKLAR: Your Honor, I will try to be brief. The
8 last word that we heard there, we don't know if the affidavits
9 are correct or not and that --

10 THE COURT: How do you explain it?

11 MR. SKLAR: Someone being in the same place?

12 THE COURT: Yes, and dozens of times, hundreds of
13 times.

14 (Continued on next page)

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1 MR. SKLAR: The same --

2 THE COURT: I thought there was a Google maps analysis
3 that would have taken 12 hours for the guy to, I lost my notes,
4 walk from point one to point two, etc., or to travel, not
5 necessarily to walk, how do you respond to that?

6 MR. SKLAR: The same way I respond to that there are
7 entries in the database that someone served process in 1930.
8 We're not saying they served process in 1930. There's a
9 mistake. What we're talking about are 77,000.

10 THE COURT: There are so many mistakes. There seem to
11 be so many mistakes. 327 times he claimed to be in two or more
12 places at the same time.

13 MR. SKLAR: And that is a big number. But when it's
14 viewed in the context of 77,000 services, adding all of their
15 anomalies and aberrations and errors, you have a total of under
16 five percent. So they're saying 95 percent of the services we
17 have no evidence there's anything wrong with them. There are
18 five percent we may have made a mistake. Therefore, all 100
19 percent are false. So when they say we don't know yet if
20 they're false, but we can certify class anyway, they certify
21 class by a finding that they're all false. So really it's a
22 tautology here. The only way to certify a class is to find
23 that they are false. What they're admitting, we don't know yet
24 if they're false.

25 THE COURT: There seem to be some strong indications

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1 that there are patterns of falsity here. Why is it not enough
2 to say let's look at this on a classwide basis?

3 MR. SKLAR: I would respectfully suggest that what we
4 have is a pattern of an error in under five percent of the
5 cases which, what we need to do is an individualized
6 assessment.

7 THE COURT: How is an inadvertent mistake to swear
8 under oath nine different times that you were at a certain
9 place at 4 p.m. on March 29, 2007? You're saying it's
10 plausible that that was inadvertent.

11 MR. SKLAR: In his logbook, if he put down --

12 THE COURT: Maybe he doesn't have a logbook.

13 MR. SKLAR: You're asking how it's possible. Again,
14 I'm just a lawyer. Less than five percent of the times,
15 whether the logbook he put down 4:15 and he should have put
16 4:25 or the person who did the data entry put in 4:25 instead
17 of 4:15, those are the individualized type of assessments, if
18 they don't have their logbooks at a Traverse hearing, out the
19 case goes, and there's no service. But it has nothing to do
20 with the allegations.

21 THE COURT: But the class treatment is we don't even
22 need to get to the Traverse. The argument is this: We don't
23 need to get to the Traverse because if indeed the affidavit of
24 service is false, you throw it out and you start back at square
25 one. You don't need to get to the Traverse.

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1 MR. SKLAR: Correct, but the assumption is if the
2 affidavit is false, and how do they prove or suggest or want
3 you to find that all 77,000 --

4 THE COURT: Can I say that there's enough of a pattern
5 here to cause me to believe that there was wholesale,
6 widespread lying on these affidavits of service or these
7 affidavits of merit, such that it warrants class treatment?
8 That's the question.

9 MR. SKLAR: Of course, your Honor. And I suggest
10 respectfully that it doesn't.

11 THE COURT: Why not? Why not?

12 MR. SKLAR: Because we're talking about in the overall
13 universe less than five percent of the pattern, which means
14 that you look at the 95 percent, which is a much larger pattern
15 where there isn't a problem. That to me says that you don't
16 have any basis to believe that all 77,000 affidavits are made
17 up out of whole cloth. What plaintiffs would have us believe
18 is that all the process servers sat around in the cafe and just
19 made up 77,000 lies. There's no basis to come to that
20 conclusion, your Honor. It's a leap of faith that makes no
21 sense.

22 For them to argue there must have been 77,000 false
23 affidavits because, Gosh, if any of these underlying defendants
24 were served, they surely would have shown up in court, as
25 alluded to in their report, that's belied by the fact that

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1 they've admitted they had debts and didn't pay them at the
2 depositions. They've admitted, at least two of the individual
3 plaintiffs, they would have received a scheduling letter by the
4 court notifying them of the proceedings and they somehow
5 ignored that also, they ignored everything until at least in
6 one of these cases, the marshal's letter went to the same
7 address where service was made, where the court letter went to,
8 then when they realize they're about to lose their salary
9 garnish, then they wake up and say a-ha, so that's not evidence
10 of sewer service, your Honor.

11 THE COURT: Yes, go ahead.

12 MR. GOLDFARB: A few critical points, and I don't know
13 when the record is closed before the Court with regard to class
14 certification.

15 THE COURT: Not necessarily. That's a question. Do
16 the parties want a hearing? Theoretically, you could have one
17 if you wanted one. I don't know. Did you want to submit more
18 evidence? Then I would, if so, ask the plaintiffs whether they
19 object.

20 MR. GOLDFARB: Actually, just the opposite, your
21 Honor. I think the record is and should be closed. Under the
22 ruling in In Re IPO, the Court has the burden to conduct a
23 rigorous analysis of the facts presented by the plaintiffs now
24 and then determine whether or not they've met the burden.

25 THE COURT: I don't think IPO precludes me from

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1 holding a hearing if I want to have a hearing. I don't know
2 that I want to, but I don't think it precludes me from doing
3 that.

4 MR. GOLDFARB: Your Honor, speaking to the point that
5 was just discussed, whether this very limited so-called pattern
6 that's been shown by an IT consultant with no opportunity to be
7 cross-examined, we ask for the opportunity to take
8 Mr. Egleson's deposition.

9 THE COURT: One way to do this is to have a little
10 hearing, put Fabacher on the stand, and put deJesus on the
11 stand. We could do that. Are the parties interested in that?

12 MR. GOLDFARB: Your Honor, no, from the defense
13 standpoint. But let me say this.

14 THE COURT: The reason I ask is you were complaining
15 about not having the ability to cross-examine him. That's all.

16 MR. GOLDFARB: Let's assume for discussion purposes
17 that what he concluded is correct.

18 THE COURT: Yes.

19 MR. GOLDFARB: That is not sufficient for the
20 plaintiffs to ask this Court to certify a class as to 100,000
21 debtors who had default judgments entered against them. That
22 is simply not sufficient under Wal-Mart. That's exactly what
23 Betty Dukes was trying to do in Wal-Mart. She was trying to
24 extrapolate from some number of instances of sex discrimination
25 with regard to advancement.

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1 THE COURT: Wal-Mart is different. It's such a
2 massive class. It's nationwide, many, many, many stores all
3 around the country.

4 MR. GOLDFARB: To us, this is a massive class, your
5 Honor.

6 THE COURT: It's a massive class, maybe, but in a
7 different sense. How many offices does Mel Harris have, one?
8 It's one office. It's different.

9 MR. GOLDFARB: It's massive in the sense that they are
10 taking a small number of instances and asking this Court to
11 extrapolate from that and say an entire class of 100,000 people
12 are entitled to relief. I don't think the Court can do that
13 based on what the plaintiffs have put forth.

14 But, your Honor, let me move to what I think is an
15 even more important issue, which hasn't even been discussed in
16 any of the briefings by the plaintiffs, although they have a
17 responsibility to, and that is the RICO claim. RICO's like the
18 800-pound gorilla in this case. It's the only cause of action
19 that requires a showing of scienter. It requires the
20 plaintiffs to show that the defendants in this case intended to
21 enter into a scheme.

22 THE COURT: Does this impact on class certification?

23 MR. GOLDFARB: Absolutely, your Honor. I refer you
24 respectfully to the Agostino v. Quest Diagnostics case in the
25 Second Circuit. Just briefly the facts in that case, the

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1 plaintiff accused Quest and its debt collectors of engaging in
2 a RICO conspiracy because they overcharged subscribers for
3 Quest Diagnostics services and the court there said
4 specifically the plaintiffs have the burden of showing scienter
5 and the plaintiffs have not presented any classwide plan or any
6 facts that would establish that Quest intentionally --

7 THE COURT: You don't think if I were to accept it
8 that evidence of patterns of submitting false affidavits
9 reflects scienter?

10 MR. GOLDFARB: Actually, your Honor, no, because what
11 is involved here is an allegation that Leucadia, which is a
12 public company, Mel Harris, and Samserv conspired together and
13 each of these three companies were involved in all of these
14 activities as part of a RICO conspiracy. There are no facts in
15 the case whatsoever, and, miraculously, your Honor, plaintiffs
16 didn't even refer to RICO in their pleading. You indicated
17 that your Honor had read their pleadings. There is no
18 reference whatsoever to their burden to show facts to establish
19 intent, to proceed against debtors with the intent to defraud,
20 which is the mail and wire fraud standard. That is critical
21 and Agostino and other Second Circuit cases --

22 THE COURT: Sounds like a motion to dismiss or a
23 motion for summary judgment. But, in any event, I understand
24 your point. I understand your point.

25 MR. GOLDFARB: With all due respect, if your Honor's

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1 going to go ahead and certify the class, it has to exclude RICO
2 from that class cert. We don't think it should anyway, but it
3 cannot include a RICO claim.

4 THE COURT: I understand the point. I am generally
5 skeptical of RICO claims, but I understand the point.

6 MR. GOLDFARB: I was going to go on and describe the
7 facts in the record that set forth the actual relationships
8 between the parties. If your Honor doesn't have time for
9 that --

10 THE COURT: If you want to tell me something, go
11 ahead. We're almost two hours at this now.

12 MR. GOLDFARB: Your Honor, there were documents
13 provided to the plaintiffs back in February which lay out the
14 joint venture, lay out the relationships between the parties.
15 They had plenty of time to take depositions. The nature of the
16 relationship between Leucadia and Mel Harris is simply a
17 lawyer-client relationship. Leucadia is in a joint venture
18 with Rushmore Recovery to buy consumer debt, and they created
19 L-Credit, which then went out and hired Mel Harris, and the
20 retainer agreement sets forth very clearly the rights and
21 responsibilities.

22 THE COURT: The allegation goes beyond an ordinary
23 lawyer-client relationship. The allegation is that there is
24 this scheme to defraud consumers, debtors, and that your client
25 was in on it.

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1 MR. GOLDFARB: Your Honor, the allegation does. When
2 we were reviewing the motions to dismiss, the Court had to
3 assume as true all the allegations in the complaint. Now the
4 plaintiffs have to come forward and back up those allegations,
5 and not only did they not, they didn't even discuss the basis
6 for the so-called conspiracy.

7 THE COURT: I think the plaintiffs are correct, they
8 don't have to prove the claims on the merit. They have to
9 prove that the claims should be dealt with on a classwide
10 basis. If you win the case, if it's certified as a class and
11 then you win, that helps you in some ways.

12 MR. GOLDFARB: Your Honor, I respectfully disagree
13 with that. If you look at the IPO case and look at the cases
14 that have come down since the 2003 amendments to Rule 23, they
15 require that this Court conduct a rigorous analysis of the
16 facts in support of every element of Rule 23 and conclude that
17 they've met the burden by a preponderance of the evidence.

18 THE COURT: For class certification.

19 MR. GOLDFARB: As to each element of the law.

20 THE COURT: Not to prove that they will win the case
21 in the end.

22 MR. GOLDFARB: They have to establish the elements of
23 the alleged law violations, your Honor. We can file a
24 supplemental brief on that, but that is absolutely clear under
25 the cases.

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1 THE COURT: I'm pretty familiar with IPO.

2 MR. GOLDFARB: And Hydrogen Peroxide.

3 THE COURT: I've issued class certification decisions,
4 including denying. I understand your points.

5 MR. GOLDFARB: Thank you, your Honor.

6 THE COURT: Brief rebuttal?

7 Did you want to add anything else, Mr. Scher?

8 MR. SCHER: No, your Honor. Just a quick point in
9 that obviously with respect to the issue of Samserv, the one
10 distinction that I think that's being overlooked, and it
11 dovetails with what Mr. Sklar said, we're looking at the
12 potential to certify a class that talks about all three
13 entities in this amorphous circle and to the extent, I'm very
14 friendly with Mr. Sklar, who is sitting next to me, but to the
15 extent that there's an issue with service of class, there's
16 never been a translation to that being something that was a Mel
17 Harris issue or a Leucadia issue, and I think Mr. Sklar was
18 trying to get to that point, but I just wanted to clarify.

19 THE COURT: I understand, but the suggestion is that
20 including because of the financial arrangements, etc., etc.,
21 they're all working hand in hand. That's the allegation, I
22 understand, and the defendants deny it. I understand.

23 Mr. Brinckerhoff.

24 MR. BRINCKERHOFF: Just two things. One a point of
25 clarification, just so the record's clear, Mr. deJesus

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1 submitted an affidavit that really only went to numerosity.

2 Mr. Egleson submitted an affidavit that examined all
3 of the records of affidavit of service, and I'm assuming when
4 the Court made reference to Mr. deJesus that it involved that
5 because Mr. deJesus is really not very critical because I don't
6 think numerosity is seriously disputed.

7 Secondly, I know the Mel Harris defendants cited to
8 and submitted a case yesterday from May called Hasbrouck.
9 Could we be allowed to submit just a little supplemental
10 authority on that exact point?

11 THE COURT: Did they write anything, or did they just
12 submit the case?

13 MR. SCHER: Submitted the case.

14 THE COURT: If you want to submit any cases for me to
15 look at, you can, but no briefing.

16 MR. BRINCKERHOFF: Just cases, like a Rule 28(j)
17 letter or something.

18 THE COURT: Yes. If there are other cases on point,
19 sure, but if they didn't do a letter brief, then plaintiffs
20 shouldn't do a letter brief.

21 MR. BRINCKERHOFF: We will not.

22 THE COURT: When can you have that?

23 MR. BRINCKERHOFF: Tomorrow.

24 THE COURT: Yes.

25 MR. GOLDFARB: Your Honor, one last point.

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1 Tell me if I've said too much about this. The law is
2 very clear, and one sentence from the Agostino case, "Proving
3 the underlying acts of racketeering requires plaintiff to
4 demonstrate that Quest participated in a scheme with specific
5 intent to defraud."

6 This is not in a summary judgment motion. This is in
7 a Rule 23 proceeding to determine whether a court can certify a
8 class in RICO.

9 THE COURT: I don't have the case in front of me. My
10 understanding is the plaintiffs, if they get that far, will
11 have to prove that intent. The question is whether the
12 plaintiff now shows by a preponderance that the class action is
13 the way to go to determine those claims on the merits.

14 MR. GOLDFARB: With regard to each claim, your Honor.

15 THE COURT: Yes. I understand. Certainly one would
16 want to analyze class certification of a RICO claim differently
17 or independently of class certification of a debt claim, a fair
18 debt claim. There should be different analyses. I'm not
19 fighting with you. But I think to the extent that you are
20 suggesting that the plaintiffs must now prove their case on the
21 merits, I don't think that is accurate.

22 MR. GOLDFARB: Your Honor, they simply have to prove
23 intent to defraud. Your Honor, if this Court certifies a RICO
24 class action, it's all over. These defendants could be liable
25 for as much as \$100 million because they're seeking treble

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1 damages and disgorgement, and so what happens after the class
2 certification hearing is almost meaningless.

3 THE COURT: Whether they should be liable for RICO
4 damages, I don't know. If they committed RICO violations, so
5 be it. If they did, I don't know.

6 MR. GOLDFARB: But, your Honor, plaintiffs have to
7 show that now.

8 THE COURT: That's not true.

9 MR. GOLDFARB: They have to show intent to defraud.

10 THE COURT: That's not true.

11 MR. GOLDFARB: Could I file a letter brief on that,
12 your Honor?

13 THE COURT: No. The answer is no. You've made your
14 point. You can order the transcript. I'll have the
15 transcript. I don't need more briefing. I understand your
16 point. I'm trying to respond twice.

17 Anything else today? I'd like you to order the
18 transcript on an expedited basis so I have it. I have five
19 Second Circuit sittings next week, but hopefully within a week
20 or so after that, I'll rule on this.

21 In terms of the discovery deadline, we will extend it.
22 Let's just wait and see what happens. Thank you.

23 (Proceedings adjourned)
24
25